Filed 6/28/19 P. v. Chow CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN FRANK CHOW, Defendant and Appellant.	H045576 (Santa Clara County Super. Ct. No. B1581621)

I. INTRODUCTION

A jury convicted defendant Jonathan Frank Chow of sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b)),[1] three counts of committing a forcible lewd or lascivious act on a child under the age of 14 years (§ 288, subd. (b)(1)), and possession of child pornography (§ 311.11, subd. (c)). The trial court sentenced defendant to an indeterminate prison term of 15 years to life, consecutive to a determinate term of eight years eight months.

On appeal, defendant contends that his statement to the police prior to arrest was involuntary, and the trial court prejudicially erred in denying a motion to suppress that statement and a subsequent statement made after his arrest. Defendant also argues that

[1] All further statutory references are to the Penal Code unless otherwise indicated.

there was insufficient evidence that he used force, menace, or duress to commit the forcible lewd or lascivious acts.

For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

Prior to trial, defendant filed a motion to suppress statements that he made to the police before and after his arrest on September 15, 2015. He provided the trial court with transcripts of the statements, as well as reports from a psychologist regarding defendant's personal characteristics and from a professor of law and psychology regarding the interrogation techniques of the police. Defendant contended that his first statement to the police was involuntary, and that the second statement was "the fruit of the first coerced statement." The court denied the motion.

A. *The Prosecution's Case*

1. The victim's initial reports to her mother and the police

The victim was eight years old at the time of the incident. She was in the third grade and attended an afterschool program at the same location as the school. Upon being picked up by her mother on September 15, 2015, the victim told her mother that a teacher's aide, later identified as defendant, had touched her private parts. The incident occurred when defendant was accompanying her to look for her lunch bag, which she thought was missing. The victim reported to her mother that defendant took her to the schoolyard to look for it and then "pulled" her to some trees near a fence. He asked her to pull down her pants and then he touched her. The victim was crying as she recounted these events to her mother. She told her mother that the lunchbox turned out not to be lost and that it was in the classroom.

Sunnyvale Public Safety Officer Ben Holt responded to the school and interviewed the victim in the mother's car.[2] The victim reported that defendant "took [her] over to the trees" and asked her to pull down her underwear and pants. The victim indicated that she complied because she was scared. She reported that defendant put his finger "on" her private part. Upon further questions from the officer, she indicated that the tip of defendant's finger was "in" her vagina.

2. Defendant's first statement to the police

After talking to the victim, Officer Holt interviewed defendant at the school. An audio recording of the interview was played for the jury, and a transcript of the recording was provided to jurors.

Defendant told the officer that he had just turned 18 years old the day before. He offered to show the officer where he and the victim had searched for the lunch bag. Defendant denied that he took the victim to the area of the trees and initially denied touching the victim inappropriately.

Defendant used the bathroom at one point during the police interview. The officer did not recall at trial whether he had turned off the audio recording during this time but acknowledged that there could be a gap in the recording.

The officer believed defendant was being evasive initially. Defendant did not appear upset about the accusations, he was slow to respond to certain questions, and he scanned the area nervously for cameras after the officer brought up the possibility of surveillance footage. The officer eventually asked more direct questions because he believed defendant "was holding something back" and wasn't telling the truth.

Defendant eventually provided the password for a Dropbox application on his phone and indicated that it contained child pornography. He gave the officer permission

[2] An audio recording of the victim's interview was played for the jury, and a transcript of the recording was provided to jurors.

to look through his phone and his laptop, which he had with him. The officer asked defendant whether he had touched the victim's vagina. Defendant responded affirmatively and was arrested.

3. Defendant's second statement to the police

Detective Anthony Serrano of the Sunnyvale Department of Public Safety was assigned as the sexual assault investigator. He talked to defendant that evening at headquarters in a room used for interviewing witnesses, victims, or suspects. A video recording of the interrogation was played for the jury, and a transcript of the recording was provided to jurors.

After being advised of his *Miranda* rights,[3] defendant admitted that he "touched a girl where [he] shouldn't have touched her." He stated that he "pulled [the victim] to the side" and went behind the trees. Defendant pulled the victim's pants down, "grabbed her around the hip area," "pulled her closer," and touched "the lips of [her] vagina," but there was no penetration. When asked whether his finger went between the "lips" without going fully in, defendant responded, "Just very little. It was barely in there." He stated it was "along" the vagina, "rubbing against it." Defendant later indicated that his finger was between her labia.

During the incident, defendant asked the victim to be quiet and kissed her on the lips. He also touched the victim's chest under her shirt. He exposed his penis and asked the victim to touch it. She touched it but "flinched back."

Defendant admitted that the victim verbally indicated that she wanted to leave, but he continued touching her and verbally indicated that they would stay longer. When they finally left the tree area, he asked whether she was going to tell anyone. The victim shook her head "no." Defendant indicated to the detective that children may be told "how to behave via questions," such as "[a]sking them if it's nice, if it's kind, is it

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

responsible to do such and such," and that he "just carried into that role, too." Defendant stated that, after they returned to the classroom, he deleted a picture that he had taken during the incident.

Defendant reported that he had been "sexually attracted to kids her age for . . . quite a bit of time now." He admitted that he had a "lot" of child pornography on his phone and/or computer, meaning images and videos. For the images on his phone, he used a Dropbox application. Defendant gave the detective the passwords to his phone, Dropbox account, and laptop. Defendant also consented to the police taking a computer from his residence and searching the computer.

Detective Serrano gave defendant an opportunity to write a letter to the victim. In the letter, defendant stated that what he did was "unexcuseable." He had "urges to do such things for years." Defendant stated that, "[t]hrough this incident, it felt extremely freeing to talk about [his] problems" and that he "might even get the mental treatment [he] need[s]."

4. Additional police investigation

Defendant provided consent to access information contained on his cell phone and in a Dropbox account. Dropbox is a company that allows people to store online photos or videos. Defendant's Dropbox account contained child pornography in video and picture form.

On September 16, 2015, the day after the incident, the victim was interviewed by Detective Serrano.[4] The victim indicated that it was defendant's idea to look for her lunchbox in the field even though she had not been there earlier with the lunchbox. The victim reported that defendant "pulled [her] to the trees," "hid" her behind a tree, and "touched [her] private part." When asked whether defendant's finger was inside or

[4] A video recording of the interview was played for the jury, and a transcript of the recording was provided to jurors.

outside her private part, the victim reported that his nail was "a little bit in." The victim pointed to the nailbed on her finger to indicate how fair defendant's nail went inside her. She was scared and wanted to run away. Defendant took two pictures of her private part with his phone. He also kissed her. Defendant pulled down his pants and had the victim touch him. When he told her to touch him, she felt nervous and scared.

5. The victim's testimony

At the time of trial, nearly two years after the incident, the victim was 10 years old. She did not remember why they went to look for her lunchbox by the trees. She thought it was "[k]ind of suspicious" to be behind the trees.

The victim testified that she pulled down her pants and underwear because defendant "told [her] to." The victim was "[c]oncerned" because "no teacher should ask this question." However, she thought she would get in trouble if she didn't listen to what defendant told her to do. She usually listened to her teachers because "it's the rules," and a student "[p]robably" could be punished if the student didn't listen and did something wrong in class.

The victim testified that defendant touched her private area with one finger for about a minute. He also kissed her on the hair. He took off his pants and underwear. He told her to touch his private area, which she did. She was scared during the incident.

The victim told defendant that she wanted to go back to the classroom, but he said, "[F]ive more minutes." They remained in the tree area a little longer. The victim testified that she told her mother, the police, and a doctor or a nurse the truth about what happened that day.

6. Expert testimony

Dr. Blake Carmichael testified as an expert about child sexual abuse accommodation, which pertains to how children deal with, and report, sexual abuse. A child may feel helplessness because the perpetrator is bigger, stronger, and cognitively more mature; the perpetrator may have authority over the child; and the child may be

afraid about what will happen after the abuse is reported. A child may also make unconvincing or inconsistent disclosures by reporting only part of what happened because the child is unsure of how the report will be received, whether he or she will be believed, or whether he or she will be protected.

B. *The Defense Case*

The victim was examined at the hospital by a Sexual Assault Response Team (SART) nurse. The victim indicated to the nurse that defendant "use[d] his hands and fingers to play around my private area." She denied that his finger went inside her vagina. The nurse testified that, "[f]or the SART exam, the definition of penetration is anything in between labia." The nurse did not specifically ask whether defendant's finger went between the victim's labia.

Dr. Richard Leo, a professor of law and psychology at the University of San Francisco, testified as an expert in the general study of social psychology and criminology, and in the specific study of police interrogations, coercion, suggestion, and persuasion. Dr. Leo testified that certain interrogation techniques by themselves, or in conjunction, are psychologically coercive and can increase the risk of eliciting false confessions or "over-confessing." Those techniques include suggesting a suspect will get help if the suspect makes an admission, promising leniency in exchange for a confession, or offering a scenario that minimizes blame or motivates a suspect to believe it is better to admit than to continue to deny. Certain personality traits also increase the risk, including those with psychosocial immaturity, which is correlated with youth.

Defendant testified in his own defense. He had turned 18 years old the day before the incident and weighed approximately 280 pounds. He had been working at the school for approximately five weeks before the incident. The victim was "a small girl." The contact between defendant and the victim prior to the incident was usually in a group setting with no direct contact. Defendant testified that the incident was the first time that he had had individual contact with the victim.

Defendant and the victim went to look for her lunchbox. Regarding physical contact while they were walking, defendant testified that he held onto the victim's hand between the fingers and the wrist "[m]ost of the time while [they] were walking." He testified that he was "guiding" her, not pulling her. At one point, he "pushed her on her lower back just a little bit to redirect her in the direction of the play structure" because she "g[o]t distracted" and "veered a little bit to the right."

Defendant testified that they went behind the trees because the victim said she went there during recess. According to defendant, he had let go of her hand by this point, and she followed him to the trees.

Defendant admitted that in the past he had had "sexual thoughts . . . about children." Once they were out of sight behind the trees, defendant "began having these fantasies" that he "usually tr[ies] to keep to [himself]." For a "very long time" he had been "turned . . . on" by seeing naked young girls. He denied planning the incident.

Defendant initially testified that he "pulled her pants down," but he later testified that the victim pulled it down herself. While the victim's pants were down, he took a picture with his phone.

When asked at trial whether he "ever change[d] her position at all physically by putting [his] hands on her," defendant testified that he "pulled her towards [him] very gently by holding her around the hip area." He characterized it as "nothing more than like a 2- or 3-inch adjustment." He "placed [his] finger in between her legs" for "maybe 20 or 30 seconds." The victim asked "if she could go back or[,] 'Are we done yet?' " Defendant replied, "Just a few more moments" or "seconds."

Defendant asked the victim to touch his erect penis, which he had exposed. She flinched after touching it. Defendant touched the victim's chest and kissed her lips. He pulled up her pants and they walked back to the classrooms. Defendant testified that he deleted the picture on his phone after they returned to the classroom.

Defendant testified that he was regretful about what had happened but acknowledged that he did not immediately tell the police what he had done. He acknowledged that he repeatedly lied for more than 15 minutes during the first interview with the police by, for example, denying that he had asked the victim to take off her pants, denying that the victim's pants were off, and denying that he had touched the victim inappropriately.

Regarding his first interview with the police, defendant testified that the officer was polite and seemed like he cared. According to defendant, there was a gap of approximately five minutes in the audio recording. During this time, he made a phone call to his father and he went to the bathroom. Defendant testified that, before the audio recording resumed, the officer "made reference to mental health a few times during a short conversation." The officer indicated that if defendant told the officer what happened, then defendant could get help from a "specialist," which defendant interpreted to mean a therapist or someone who could help him with his mental illness. Defendant testified that this was the first time anyone had known about what he was "dealing with." The officer was "compassionate" and had offered defendant a "solution to the problem that [he] could not solve." Defendant testified that the officer's "solution of help pushed [defendant] into" disclosing information, and that he started volunteering information about the child pornography that he possessed. Defendant testified that it "felt really good" to get it off his chest.

Defendant testified that the "specialist" turned out to be Detective Serrano. By that time, defendant had already admitted that he had touched the victim. Defendant testified that he thought he had to talk to the detective before having access to a specialist.

Defendant testified that he told Detective Serrano there was no penetration involved. Defendant testified that he indicated to the detective that he rubbed his finger "along the outside of the lip," meaning the victim's labia, and between the victim's

"thigh and the outer lip," "not in between" the lips. Defendant testified that when he told the detective that he "went in … a little bit, but not into the hole," he meant "slightly crossing the plane of the lip, across the lip." He testified that "hole" meant "between the two lips of the labia majora." He further testified that he "never went into the hole," that he "was alongside it," and that he "may have crossed a tiny bit over, but [he] never left alongside it."

Defendant testified that he did not put his finger "between [the victim's] lips." At trial, he was asked to review a transcript of his second statement to law enforcement. According to the transcript, Detective Serrano asked defendant whether his finger went "between the lips without going fully in," and defendant responded, "Just very little. It was barely in there." At trial, defendant testified that the transcript was incorrect, and that in the video the detective said "lip," not "lips."

Defendant admitted, however, that in response to the detective's question later about whether he had touched between the victim's "lips," meaning labia, he said, "Yes." He testified that he made the response in "haste" and out of "frustration" because he "still hadn't seen the specialist" that had been offered to him during his first interview. Defendant thought he would be kept there with the detective "forever" and he was afraid that he wouldn't get mental health help if he "didn't say it was between the lips." He testified that when the officer during the first interview mentioned mental health, he thought he would be able to see someone, such as a therapist, who could determine what was "wrong" with him and how to "fix it," because he "disliked it a lot" and had attempted suicide twice. Defendant testified that prior to this incident, he had wanted to get help.

Defendant admitted that he cheated on multiple tests in high school.

C. *Convictions and Sentence*

Defendant was convicted of sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b); count 1), three counts of committing a forcible lewd or

lascivious act on a child under the age of 14 years (§ 288, subd. (b)(1); counts 2-4), and possession of child pornography (§ 311.11, subd. (c); count 5). The trial court sentenced defendant to an indeterminate prison term of 15 years to life, consecutive to a determinate term of eight years eight months.

III. ANALYSIS

A. *Denial of Defendant's Motion to Suppress Statements to the Police*

Defendant contends that his first statement to Officer Holt before he was arrested was involuntary, and therefore the trial court's admission of the statement deprived him of due process under the federal constitution. He argues that his youth, immaturity, and mental state made him susceptible to coercive interrogation techniques, which in this case included false evidence ploys, minimization/maximization techniques, and an implied promise of mental health counseling. Defendant contends that his second, post-arrest statement to Detective Serrano should have been excluded as "the fruit" of the earlier involuntary statement. Defendant further argues that he was prejudiced by the erroneous admission of the two statements.

1. Defendant's first statement to the police

Officer Holt spoke to the victim at the school and then talked to defendant at the school. Defendant had waited at the school for the police to arrive after the victim's mother confronted him about the inappropriate touching. This initial statement by defendant to the police was recorded.[5]

Officer Holt asked defendant what happened with the victim. Defendant explained that he had helped the victim search for her missing lunchbox. He pointed to where they had searched and offered to walk with the officer to show him. Defendant denied going by the trees.

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[5] Although defendant's first statement to the police was audio-recorded, it appears from the record that defendant provided only a written transcript of the recording to the trial court when he moved to suppress the statement.

Defendant told the officer that when the victim's mother accused him of pulling down the victim's pants and touching her private areas, he told the mother that he didn't believe it, and that there must have been a "miscommunication." The officer asked defendant whether he had touched the victim inappropriately. Defendant responded, "I don't think so." He only held her hand or wrist, and he pushed her along and tugged her arm when she got distracted. The officer asked whether the victim took her pants off. Defendant stated, "No. Or not that I saw but I was a little ahead of her. But I don't think she took her pants off at any time." The officer asked whether defendant touched the victim's vagina, and defendant responded, "No."

The officer told defendant that he was not in trouble, and that the police had to investigate the matter. There were "plenty of surveillance cameras around," the police were going to review the footage, and everything would be "fine" if defendant "didn't have anything to do with it." However, if the surveillance cameras captured something inappropriate or captured defendant taking the victim behind the trees, then defendant would have "some explaining to do." Defendant agreed.

The officer asked whether defendant took the victim "back there to use the bathroom," which "could be an explanation for going by the trees." Defendant indicated that the victim did not go to the bathroom.

The officer asked whether defendant was willing to provide a DNA swab from his finger in view of the allegations. The swab would "help [defendant] out significantly." "[S]oap can't even scrub certain DNA off," so the DNA sample from defendant's finger "would probably work to [defendant's] advantage." Defendant agreed to provide a sample.

The officer told defendant that it was "pretty serious" and "kind of unusual for an eight year old to make something like this up." Defendant agreed. The officer stated that "we all make mistakes and we all screw up." The officer explained that he was trying to determine whether there was a "misunderstanding," that maybe the victim went to use the

bathroom and defendant helped her and was scared, and that the officer was "just throwing stuff out there." The officer referred to surveillance footage and indicated that he was "trying to sort this all out right now." He wanted defendant to have the "option" of disclosing any inconsistencies in his statement now, because it would look more suspicious after surveillance footage was reviewed. The officer indicated that everyone understands that people make mistakes, but people are less understanding of those who lie. He was trying to help defendant, and defendant needed to "think long and hard if there [were] any inconsistencies." The officer again referred to surveillance cameras and stated, "The camera doesn't lie." The officer stated that it was "kind of bizarre." He asked whether it was possible defendant and the victim had "wander[ed] a little farther."

The officer also indicated that the police were not concerned with whether defendant had violated company policy by, for example, helping the victim go to the bathroom. Rather, they were concerned with the victim's safety. The officer asked whether there was "any possibility" that defendant had helped the victim "use the restroom over there." Defendant responded in the negative, stating that the victim "never talked to [him] about restrooms over there."

The officer stated that a sexual assault examination would be conducted on the victim, and that DNA evidence would be collected. If defendant touched the victim, his DNA would "be there." The officer asked whether defendant could think of any explanation as to why his DNA would be on the victim's private parts. Defendant stated that he had earlier helped the victim get a leaf off her shirt because she was playing in the leaves during recess, but that wouldn't qualify as inappropriate touching.

The officer expressed concern that defendant may not be telling the truth. Defendant responded, "It's as much of the truth I can think of." The officer and defendant again discussed the route that defendant took with the victim in looking for the lunchbox.

Officer Holt stopped his conversation with defendant to speak with another officer, who indicated that additional law enforcement officers were "on their way from headquarters." Resuming the conversation with defendant, Officer Holt asked whether defendant had sent a text or called anyone about the incident. Defendant allowed the officer to look at his phone. The officer found pictures of Scantrons indicating that defendant had cheated on at least one test.

During the ensuing discussion, Officer Holt indicated that "other officers" were "on their way down here because . . . they're kind of the . . . head honchos when it comes to all this stuff," and they may want to talk to defendant. While waiting for the other officers, defendant was allowed to call his parents to let them know he'd be late for dinner.

After an apparent break in the recording, Officer Holt stated to defendant, "So, dude, . . . like I was saying, man, if you did do something inappropriate and made a mistake -- [¶] . . . [¶] -- it's an illness. You . . . may need some help. I mean you do need some help if that's what you did. But I'll tell you what -- [¶] . . . [¶] -- if you did do that, okay, and you're not being honest about it, it's not fair to that little girl and it's not fair to you because if you need help, you need help." The officer stated that it was his "personal opinion" that "this is a mental illness." He was "getting a vibe" and "getting a feeling from [defendant] that something happened" and that defendant wanted to tell the officer about it. He understood defendant was scared and embarrassed but defendant "need[ed] to fess up. The truth is going to come out." The officer stated that defendant "need[ed]" to tell the officer what happened. Defendant responded, "Is it okay if I talk to that specialist guy first and see my options?" The officer stated that "the detective is on his way down here right now." Defendant replied, "That's perfect. Yeah." The officer stated, "Okay. But, dude, I can tell, man. I've been doing this for a long time." Defendant stated, "Oh, you can. I'm not that good of a -- [¶] . . . [¶] -- poker face." The officer responded, "So, please, can you just tell me what happened? I need you to be

honest with me, Jonathan." Defendant stated, "I think I need to understand the outcome of each scenario before I could answer that question." The officer replied, "Okay," and then spoke briefly on his radio.

Resuming his conversation with defendant, the officer stated that he (the officer) was "not in charge." Defendant indicated that he understood. The officer told defendant that he "seem[ed] like such a nice guy." The officer stated that "sometimes people can't control their urges," and that police officers "see this stuff all the time and it's depressing and it's unfortunate." "[A]s police officers, we don't make deals, we don't do any of that stuff. Okay? So I need to make that very clear." Defendant indicated his understanding. The officer continued, "[T]he detectives will be able . . . to fill you in more. Alright? But the thing is, man, I'm telling you, okay, if you told the truth, I think there is going to be an enormous lift off your shoulders. And then . . . maybe they can see – you can see a mental health professional down the road. You know, . . . get some help for this because this behavior, . . . it's not normal, right? Somebody -- in my opinion -- like I said, it's my personal opinion -- [.]" Defendant responded, "No, I understand you," and indicated that he "want[ed] to know how this will impact" his family and others.

The officer told defendant that he was 18 years old and "a man." The officer stated, "I think the first step, okay, is for you to admit to yourself that you have a problem and then to tell me . . . what's going on here."

At this point, another officer indicated to Officer Holt that he had an "[u]pdate" and that Officer Holt could "switch places." Officer Holt indicated he needed more time because "John has got something to tell me here."

Officer Holt resumed his conversation with defendant, stating, "Sorry, didn't want you to be any more uncomfortable than this already is." Defendant responded, "No, I understand. I just want to find the best possible way so my family doesn't get messed up over this incident, my friends don't get dragged down with me and stuff like that." The officer stated, "I understand that. Like I said, step number one is you need help. You

need to -- step number one is you admit that you have a problem. That you've done something wrong." Defendant responded, "Uh-huh. Uh-huh." The officer continued, "Then get you some help. Okay? I think before we can do that, you need -- you need to tell me what happened. And we're going to go get -- I'm going to go get those guys right now. Okay? But, I mean, like I said, I feel like, you know, we've been talking and I feel like I'm getting to know you pretty well, okay, and I would appreciate the truth." Defendant responded, "It's just so hard." The officer indicated his understanding. The officer stated that he had "been doing this a long time," his "heart [was] breaking right now," and he saw defendant "in anguish." Defendant responded that he didn't "know how to answer that."

The officer stated, "Let me ask you some questions then. Okay, man? And this is hard. Okay? Did you ask her to take her pants off? I know this is tough, man." Defendant responded, "The way I'm acting it's pretty obvious what the answer is."

The officer told defendant that he needed to "man up" and take responsibility, and that it takes "a strong man to do that." Defendant stated, "[I]n case this did happen, what am I looking at?" The officer stated that he did not know, that he was "just a police officer," that people always ask about the time they are "looking at," that there are "a thousand variables," and that the police "don't play a role in that." The officer continued, "All that stuff is other people. I'm just a dumb-dumb police officer trying to get to the bottom of this who sees a guy is struggling to tell me the truth -- who wants to tell me the truth --[.]"

Defendant acknowledged to the officer: "I know that you don't have the power to tell me like what's going to happen." The officer stated, "It's not a power. I don't know." The officer continued, "So, dude, . . . you need to be honest with me, man. For you, for that little girl, for everybody, man." Defendant responded, "I know I'm fucked up in the head. I know that." The officer replied, "That breaks my heart, man." Defendant stated, "Yeah, I know. It's been like this for how many years now? Many,

many years." The officer asked, "You say fucked up in the head. What do you mean?" Defendant indicated that he couldn't "say it out loud," but that the officer knew what defendant was "implying here."

Defendant indicated that he wanted to show the officer something on his phone. Defendant opened a Dropbox application, which was a "Cloud storage device," and gave the officer his phone. The officer expressed confusion and told defendant to tell him what happened. The officer indicated that he would then have defendant "talk to . . . the specialist, to the detectives." Defendant indicated he was scared, but eventually admitted that he had child pornography stored through the Dropbox application. Defendant gave the officer permission to look through his phone and laptop, which he had with him. Defendant stated, "[Y]ou're going to find so much stuff." When the officer told defendant that he was "not under arrest right now," defendant responded that he understood and stated, "But it just feels good admitting it, I guess."

The officer asked whether defendant touched the victim's vagina, and defendant responded, "Yes." Defendant was then placed under arrest.

That evening, after his arrest, defendant gave a second statement to law enforcement during an interrogation by Detective Serrano.

2. Proceedings below

Defendant filed a motion to suppress the statement he made to Officer Holt prior to his arrest, and the statement he made to Detective Serrano after his arrest. Defendant contended that his statement prior to arrest was involuntary because of coercive police techniques. He argued that he had turned 18 years old the day before he made the statement, and that he was "very immature." Defendant contended that the officer's techniques during the first interview included offering false evidence (surveillance camera and DNA evidence), minimizing defendant's conduct (suggesting it was a mistake or a misunderstanding), and indicating that defendant had an illness and would get mental health help. Defendant contended that his second statement to the police after

his arrest was "the fruit of the first coerced statement." In support of the motion, defendant provided transcripts of both police interviews, as well as reports from a psychologist and from Dr. Leo, a law and psychology professor.

According to the report from the psychologist, he interviewed and conducted psychological testing of defendant while defendant was in custody. Defendant had been arrested the day after his 18th birthday and was 19 years old at the time of the interview.

Defendant indicated to the psychologist that he was attracted to prepubescent girls. He reported feeling tormented, depressed, and having suicidal thoughts during high school. Defendant felt rejected by family and friends and had not disclosed his pedophilic urges to them. After his arrest, he saw that his family did not abandon him. Defendant reported that, with his arrest, he almost felt relief, having had to carry the burden of hiding his " 'dark thoughts' " for years.

The psychologist reported that defendant "remains somewhat immature and dependent," but that there was evidence "he is maturing." The psychologist found defendant to be "bright" and "cognitively intact," and that, "if it were not for his crimes," these attributes "could provide a firm foundation for his development, with appropriate treatment, into a productive and mature adult." The psychologist characterized defendant as a "teenager in distress," but that "[f]ortunately, he sought treatment in jail for his acute depression, and he responded well to an antidepressant medication."

In a report labelled as a draft, the law and psychology professor, Dr. Leo, indicated that he had reviewed documents pertaining to the case, including the "[i]nterrogation [t]ranscripts" of defendant. Dr. Leo characterized the interrogations as "psychologically aggressive, stressful, repetitive and manipulative." He stated that the police used techniques that had been show by research to increase the risk of eliciting false and unreliable statements. Those techniques in defendant's case included a "guilt-presumptive interrogation," "false evidence ploys, minimization, and implied suggestions of leniency and offers of help in exchange for confessing." Dr. Leo further stated that

defendant's youth made him "more likely to be highly suggestible and compliant," which increased the risk that he would "yield to the pressures of interrogation and shift [his] answers to satisfy [the] interrogators." The professor believed that defendant's confession of digitally penetrating the victim contained "indicia of unreliability."

The trial court apparently informed the parties off the record that it was denying defendant's motion to suppress, and his statements to law enforcement were admitted into evidence at trial. After the close of evidence, while the jury was deliberating, the court "put on the record the reasons [it] denied the motion." The court indicated that it had considered the transcripts of defendant's statements to law enforcement, as well as the report from the psychologist and the draft report from Dr. Leo.

Regarding defendant's statement to Officer Holt, the trial court observed that the officer interviewed the victim first before talking to defendant. When the officer subsequently interviewed defendant, who had waited to speak to the officer, the officer started with "open-ended" questions. Defendant's responses were "suspect," such as saying, "I don't think so," when asked whether he touched the victim inappropriately, or stating "I don't think" the victim took off her pants, or that he was providing as much of the truth that he could "think of." The court believed defendant's answers "indicated that [he] was not telling the truth and had more to disclose." The officer "was persistent" and "simply kept asking what happened in light of those suspicious and equivocal answers." Defendant himself volunteered that he did not have a good "poker face," that it was obvious what the answer was when asked whether he had the victim take off her pants, and that he was messed up in the head. Defendant also volunteered the fact that he had child pornography and offered his cell phone and laptop to the officer.

The trial court stated that, although the officer mentioned the "possibility" of surveillance video, but he did not state that there was surveillance video. The officer also raised the "possibility" of DNA, as well as the "possibility" that the victim had gone to

the bathroom or that there was a misunderstanding. The court found that "[a]ll of those statements were not improper techniques and did not amount to coercion."

The trial court likewise found that the officer did not use improper coercion in stating that it was an illness and defendant needed help if he engaged in the conduct. The officer never offered leniency and stated that he did not make deals. The court found it "arguably true" that defendant would receive treatment at some point if he admitted the crime and admitted he had an issue.

The trial court concluded that "it was clear both from [defendant's] answers and his demeanor . . . that [he] had something to confess. So . . . in that interview there was no improper coercive techniques and the statements were voluntary." The court also concluded that the subsequent interrogation by Detective Serrano was not coercive.

3. Analysis

"An involuntary confession may not be introduced into evidence at trial. [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) "A confession is involuntary if it is 'not " 'the product of a rational intellect and a free will' " ' [citation], such that the defendant's 'will was overborne at the time he confessed.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501 (*Smith*).)

"In assessing whether statements were the product of free will or coercion, we consider the totality of the circumstances, including ' " 'the crucial element of police coercion,' " ' the length, location, and continuity of the interrogation, and the defendant's maturity, education, and physical and mental health. [Citation.]" (*People v. Duff* (2014) 58 Cal.4th 527, 555-556 (*Duff*).) Significantly, " '[a] finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a

resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 347 (*McWhorter*).)

The prosecution has "the burden of establishing by a preponderance of the evidence the voluntariness of a confession. [Citations.]" (*Duff, supra,* 58 Cal.4th at p. 551.) "In reviewing the trial court's denial of a suppression motion on . . . involuntariness grounds, ' " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " ' [Citations.]" (*Ibid.*)

Regarding the circumstances of defendant's statement to Officer Holt in this case, defendant makes no contention concerning the length, location, or continuity of the questioning by the officer. Instead, defendant focuses on his personal characteristics and purported coercion by Officer Holt.

Specifically, defendant contends that he was susceptible to coercive techniques by the police. He argues that he had just turned 18 years old, was "very immature," had no prior experience with the police, was a loner with few friends, was alienated from his family while living with his parents, and was "struggling with the great weight of his secret attraction to prepubescent females."

We initially observe that the record does not reflect that the officer was aware of, or exploited defendant's claimed vulnerabilities in order to obtain a statement from him. (See *Smith, supra,* 40 Cal.4th at p. 502.) Although defendant reported that he had just turned 18 years old, and although the officer apparently suspected that defendant was not being truthful about whether he had inappropriately touched the victim, the officer had no reason to know about any other characteristics of defendant that purportedly made him particularly vulnerable to police coercion.

For example, during the interview, defendant asked the officer whether he could call his parents to let them know that he would be late for dinner, which would not suggest to the officer that defendant was alienated from his parents. Likewise, in contrast to defendant's claim on appeal that he was a loner, he told the officer, "Me and two of my friends, we came together knowing the principal and then she hired us." Defendant later referred to those two people as being "[g]ood friends." He also told the officer that he had played varsity soccer, which further belied the notion that he was a loner. Similarly, although defendant had just turned 18 years old and had no prior experience with police, the officer found pictures of Scantrons on defendant's phone indicating that he had engaged in cheating on tests. Given defendant's deceitful behavior in this regard, and in view of defendant's responses throughout the interrogation, the officer had no reason to believe that defendant was any less sophisticated, less mature, or more alienated than the average young adult. (See *People v. Richardson* (2008) 43 Cal.4th 959, 993 [rejecting a claim that the defendant's low IQ made him particularly vulnerable during an interrogation, where the police "had no reason to know" about the low IQ and the defendant's responses during the interrogation did not indicate a mental defect].) Indeed, according to the psychologist's report attached to defendant's motion to suppress, defendant appeared to be "bright" and "cognitively intact."

Even assuming defendant's personal characteristics made him susceptible to coercion, we are not persuaded by his contention that his confession to Officer Holt was the product of coercion.

First, defendant contends that Officer Holt used "various aspects of the Reid style of interrogation in questioning [defendant] in this case" after only briefly interviewing the victim, who, according to defendant, "did not make any clear statement on the penetration issue."

In *In re Elias V.* (2015) 237 Cal.App.4th 568 (*Elias V.*), the appellate court explained that "John E. Reid & Associates was the largest national provider of training in

interrogation techniques." (*Id.* at p. 579.) The Reid method of interrogation has been described as follows: " 'First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing "themes" that minimize the crime and lead suspects to see confession as an expedient means of escape.' [Citation.]" (*Id.* at pp. 579-580, fn. omitted.) This interrogation should be conducted " 'only when the investigator is reasonably certain of the suspect's guilt.' " (*Id.* at p. 580, italics omitted.)

In this case, as the trial court observed, the officer interviewed the defendant by initially asking open-ended questions, such as, "[W]hat happened?" After defendant described the search for the lunchbox, the officer asked him additional open-ended questions about the victim's mother confronting him with the victim's allegations. As the trial court observed, defendant's responses to the officer's questions about the touching allegations were suspicious and at times equivocal. For example, defendant stated that he didn't think he had touched the victim inappropriately, and that he didn't think that she had taken her pants off. Throughout the officer's initial questions, the officer appeared to be investigating the incident and simply gathering facts, and his questioning was not coercive.

Second, defendant contends that, as the interview progressed, the officer engaged in "false evidence ploy[s]" by referring to video surveillance and DNA, as well as engaged in "minimization" by suggesting that everyone makes mistakes or that perhaps defendant had taken the victim to the bathroom as an explanation for going by the trees.

"In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they

tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*Smith, supra*, 40 Cal.4th at p. 501.) Regarding deceptive comments, " '[l]ies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 182 (*Farnam*).)

We are not persuaded that the officer's purported false evidence ploys and minimization techniques were "of a type reasonably likely to procure an untrue statement." (*Farnam, supra*, 28 Cal.4th at p. 182.) Regarding the purported false evidence ploys, the officer indicated that surveillance footage and DNA could inculpate *or* exculpate defendant, depending on whether he engaged in inappropriate conduct with the victim. The officer never falsely suggested that law enforcement had surveillance footage or DNA evidence showing that defendant had engaged in such conduct with the victim. Even assuming Officer Holt did not have, and could not obtain, any surveillance footage or DNA evidence, his implying to defendant "that he knew more than he did or could prove more than he could" was "permissible, for it was not ' "of a type reasonably likely to procure an untrue statement." ' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 299.) Regarding the purported "minimization" techniques, the record does not reflect that defendant adopted the officer's suggested theories as to what may have happened. For example, defendant repeatedly indicated that the victim did not use the bathroom while he was with her.

Moreover, the record does not reflect that defendant's confession was " 'causally linked' " to the officer's purported false evidence ploys and minimization techniques. (*McWhorter, supra*, 47 Cal.4th at p. 347.) Indeed, defendant on appeal acknowledges that, even after the officer used all these techniques, defendant still "repeated his version of what had taken place," meaning he did not admit to any improper touching of the

victim. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 (*Coffman*) [the defendant's admissions were not involuntary where, although certain assurances by the police raised the specter of coercion, the defendant continued to resist admitting he committed the offenses for a considerable period thereafter].)

Third, defendant refers to the following statements by the officer concerning mental health issues: it was the officer's opinion that defendant needed help if he had touched the victim inappropriately, the officer understood defendant was scared and embarrassed but he needed to confess, there would be an enormous weight off defendant's shoulders if he told the truth, maybe defendant could see a mental health professional down the road and get help for this behavior, the first step was to admit he had a problem and had done something wrong "[t]hen get you some help," "before we can do that" defendant needed to disclose what had happened, and the officer's heart was breaking and he could see defendant was in anguish. Shortly after these statements by the officer, defendant admitted that he was "fucked up in the head," indicated that he had child pornography, and admitted that he touched the victim's vagina.

As we stated above, " '[a] confession may be found involuntary if . . . obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.]' " (*McWhorter, supra*, 47 Cal.4th at p. 347; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088 ["a statement is involuntary . . . when the motivating cause of the decision to speak was an express or clearly implied promise of leniency or advantage"].) " ' "[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." [Citation.] In terms of assessing inducements assertedly offered to a suspect, " '[when] the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]" [Citation.]' " (*McWhorter, supra,* at pp. 357-358; accord, *People v. Vasila*

(1995) 38 Cal.App.4th 865, 874 ["a crucial distinction is drawn between simple police encouragement to tell the truth and the promise of some benefit beyond that which ordinarily results from being truthful"].) " '[W]hen a reviewing court considers a claim that a confession has been improperly coerced, if the evidence conflicts, the version most favorable to the People must be relied upon if supported by the record. [Citations.]' [Citation.]" (*McWhorter, supra,* at p. 357.)

In this case, the officer never explicitly promised leniency, nor did he explicitly promise mental health treatment to defendant if he confessed. The officer simply expressed the view that the inappropriate touching of a little girl implicates a mental illness in the perpetrator. The officer also expressed the view that the first step before receiving any mental health treatment is to admit the conduct, which is a general statement regarding mental health treatment applicable even outside the criminal justice system. Moreover, express statements by the officer dispelled any implication that he was promising mental health treatment. The officer stated during that portion of the interview that police officers "don't make deals" and "don't do any of that stuff," and that he "need[ed] to make that very clear." The officer later indicated that the police only investigate, that they "don't play a role" in the outcome for a defendant, and that he did not know what was going to happen to defendant.

We further observe that, during the officer's various statements regarding mental illness and treatment, and prior to defendant admitting that he had touched the victim's vagina, defendant repeatedly indicated that he wanted to find out the consequences of confessing. Defendant initially asked the officer, "Is it okay if I talk to that specialist guy first and see my options?" The officer responded that "the detective is on his way down here right now." Defendant replied, "That's perfect. Yeah." Thereafter, defendant stated that he wanted "to understand the outcome of each scenario before" he answered the officer's question, "want[ed] to know how this will impact" his family and others, and "want[ed] to find the best possible way" so his family and friends wouldn't get "messed

up" and "dragged down" with him. The officer eventually asked whether defendant had the victim take her pants off. Defendant responded, "The way I'm acting it's pretty obvious what the answer is." The officer told defendant to "man up" and take responsibility. Defendant replied, "[I]n case this did happen, what am I looking at?" After further interaction, defendant admitted that he had child pornography and that he touched the victim's vagina. The record reflects that defendant's resistance up until these admissions, "far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information." (*Coffman, supra*, 34 Cal.4th at p. 58.)

Moreover, after defendant indicated to the officer that he possessed child pornography, he stated, "[I]t just feels good admitting it." He then admitted to touching the victim's vagina. The psychologist's report attached to defendant's motion to suppress indicated that defendant "almost felt relief" with his arrest, having had to "carry[] the burden of hiding his 'dark thoughts' for years." Defendant's statements that he felt good and sense of relief after his admissions indicate that his will was not " 'overborne at the time he confessed,' " but rather were the product of free will. (*Smith, supra*, 40 Cal.4th at p. 501.)

Defendant contends that his case is similar to *Elias V.*, in which the appellate court found that a 13-year-old's confession was involuntary based on the following factors: (1) the youth of the minor, which made him susceptible to influence and outside pressures; (2) the lack of evidence corroborating the minor's inculpatory statements; and (3) the likelihood that the detective's use of deception and overbearing tactics would induce involuntary and unreliable admissions. (See *Elias V., supra*, 237 Cal.App.4th at pp. 586-587.) We find *Elias V.* distinguishable. First, the minor in that case, a 13-year-old child, was significantly younger than defendant, an 18-year-old adult. (*Id.* at p. 591; see also *id.* at pp. 594-595 [distinguishing a case involving a minor who was "nearly 18 years old" and thus "significantly older than" the 13-year-old in the case before it].)

Second, Officer Holt interviewed the victim prior to defendant, and she reported that defendant had touched her vagina. Thus, the officer had substantial evidence corroborating defendant's subsequent statement that he had touched the victim's vagina. Third, as we have explained, we do not believe the techniques used by the officer in this case were "of a type reasonably likely to procure an untrue statement" (*Farnam, supra*, 28 Cal.4th at p. 182), and the record otherwise reflects that defendant's will was not " 'overborne at the time he confessed' " (*Smith, supra*, 40 Cal.4th at p. 501).

In view of the totality of the circumstances, we determine that the prosecution met its burden of establishing by a preponderance of the evidence that defendant's statement to Officer Holt was freely and voluntarily given, not the product of coercion. As defendant's first statement to the police was voluntary, we reject defendant's contention that his second, post-arrest statement to Detective Serrano should have been excluded as "the fruit" of the earlier involuntary statement. We conclude that the trial court did not err in denying defendant's motion to suppress the statements.

B. *Substantial Evidence of Force or Duress*

At trial, the prosecutor argued that defendant used force, duress, or fear to commit the lewd acts of touching the victim's vaginal area (count 2), having the victim touch his penis (count 3), and touching the victim's chest (count 4). Defendant contends that his convictions for aggravated lewd conduct (§ 288, subd. (b)(1); counts 2-4) must be reversed because there is insufficient evidence of force, menace, or duress. The Attorney General contends that there is substantial evidence of force and duress.

We determine that substantial evidence supports the finding that defendant used force and duress to commit the lewd acts, and thus we need not address the issue of menace.

1. The standard of review

"In considering a challenge to the sufficiency of the evidence to support [a conviction], we review the entire record in the light most favorable to the judgment to

determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

2. Force

Section 288 makes it a crime to commit a lewd or lascivious act on a child under the age of 14 years. (§ 288, subd. (a).) There are additional penal consequences if the act is committed "by use of *force*, violence, *duress*, menace, or fear of immediate and unlawful bodily injury on the victim." (*Id.*, subd. (b)(1), italics added; see *People v. Soto* (2011) 51 Cal.4th 229, 233 (*Soto*).)

The "force" necessary to support an aggravated lewd act conviction under section 288, subdivision (b)(1) must be " 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' [Citation.]" (*Soto, supra*, 51 Cal.4th at p. 242; accord, *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024 (*Garcia*).) " '[A]n act is forcible if force facilitated the act rather than being merely incidental to the act.' [Citation.]" (*Garcia, supra*, at p. 1024.) "[T]his includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves. [Citations.]" (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 (*Alvarez*).) For instance, in *People v. Bolander* (1994) 23 Cal.App.4th 155 (*Bolander*), disapproved on other grounds by *Soto, supra*, at page 248, footnote 12, this court held that the defendant's acts of "inhibiting [the victim] from pulling his shorts back up, bending

[the victim] over, and pulling [the victim] towards him constitute force within the meaning of subdivision (b)" of section 288. (*Bolander, supra,* at p. 159.)

Here, there is substantial evidence that defendant used force " 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' [Citation.]" (*Soto*, *supra*, 51 Cal.4th at p. 242.) The victim reported that defendant "pulled" her to the trees and touched her private part. At trial, defendant admitted that he held onto the victim's hand and pushed her on her lower back while they were supposed to be looking for the lunch bag. Although defendant testified that these acts were for the purposes of "guiding" and "redirect[ing] her" in the right direction, that he did not plan to commit lewd conduct on the victim, and that the victim followed him to the trees after he let go of her hand, the jury was entitled to disbelieve defendant's explanations of how and why they ended up in the tree area where defendant committed the lewd acts. The victim testified that she thought it was "suspicious" to be behind the trees, which suggested that she had no reason to believe that her lunch bag was in that area and that she had no intention of going to that area to search for the bag. The jury could infer that defendant was taking the victim to that area in order to engage in lewd conduct, not to look for the lunch bag. The jury could also reasonably conclude that the victim, at eight years old and in the third grade, did not need to be pulled by the hand, pushed on the back, or otherwise physically directed to search for her lunch bag, and that defendant used these means of force to get her to the area of the trees to commit the lewd acts. (See *Alvarez*, *supra*, 178 Cal.App.4th at p. 1005 [force within the meaning of § 288, subd. (b)(1) includes grabbing, holding, and restraining the victim].)

In addition, defendant admitted at trial that, while they were in the tree area, he physically positioned the victim by "pull[ing]" her "towards [him]" by the hips. The evidence reflected that defendant touched the victim's vaginal area. "All that was necessary to commit this act was a lewd touching." (*Alvarez*, *supra*, 178 Cal.App.4th at p. 1005.) The jury could reasonably conclude that defendant's act of pulling the victim

closer by the hips was an act of force " 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself' " (*Soto*, *supra*, 51 Cal.4th at p. 242), and that pulling the victim to him " 'facilitated' " the lewd act and was not " 'merely incidental to the act' " (*Garcia*, *supra*, 247 Cal.App.4th at p. 1024). (See *Bolander*, *supra*, 23 Cal.App.4th at p. 159 [the defendant used force within the meaning of § 288, subd. (b) by inhibiting the victim from pulling up his pants, bending him over, and pulling him closer].)

Defendant contends that the victim did not resist and therefore his act of pulling her closer by the hips "was merely incidental to the act and not facilitative of it." We are not persuaded by this argument. Putting aside the factual issue of whether the victim in this case resisted, "the lewd act crimes in section 288 have been defined based on the offender's wrongful conduct only." (*Soto*, *supra*, 51 Cal.4th at p. 245.) Lack of resistance or even consent by a victim " 'does not eliminate the fact that the defendant actually uses violence, compulsion or constraint in the commission of the lewd act, nor does the victim's consent diminish the defendant's culpability or immunize the defendant from suffering the penal consequences that arise from a forcible lewd act.' " (*Ibid*.)

3. Duress

We further determine that there is substantial evidence that defendant used duress to commit the lewd acts. (§ 288, subd. (b)(1).) Duress means " ' "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." ' [Citation.]" (*Soto*, *supra*, 51 Cal.4th at p. 246, italics omitted.) " ' "The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress." [Citation.]' [Citations.] 'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that

revealing the molestation would result in jeopardizing the family.' [Citations.]" (*People v. Veale* (2008) 160 Cal.App.4th 40, 46 (*Veale*).)

We find *Veale* instructive. In that case, the seven-year-old victim was molested by her stepfather. (*Veale, supra,* 160 Cal.App.4th at pp. 46, 43.) The victim testified that the defendant did not threaten her or use physical force to commit the charged offenses, forcible lewd conduct. (*Id.* at pp. 42, 46.) The appellate court determined there was sufficient evidence of duress. The court explained that "[a] reasonable inference could be made that defendant made an implied threat sufficient to support a finding of duress, based on evidence that [the victim] feared defendant and was afraid that if she told anyone about the molestation, defendant would harm or kill [her], her mother or someone else." (*Id.* at p. 47.) The court stated that "[a]dditional factors supporting a finding of duress include [the victim's] young age when she was molested; the disparity between [the victim] and defendant's age and size; and defendant's position of authority in the family." (*Ibid.*)

In this case, the victim was a "small" eight-year-old, while defendant was a 280-pound adult. As a teacher's aide at her afterschool program, the victim perceived defendant to have the authority of a teacher who she should obey. Immediately prior to the lewd acts, defendant maintained physical control over the victim by holding onto her during "[m]ost of the time while [they] were walking." There was also evidence that he pulled her to an area secluded by trees, where the victim knew she had not been with her lunch bag. When defendant told her to pull down her pants, she was scared and believed she would get in trouble if she didn't listen to what he told her to do. Defendant indicated to the victim that she should be quiet. When she expressed that she wanted to leave, defendant refused by indicating that they were going to stay longer. When they finally left the tree area, defendant asked the victim whether she was going to tell anyone. He later acknowledged that children can be told "how to behave via questions." On this record, substantial evidence supports a finding that defendant used duress to commit the

lewd acts, in view of the victim's young age, the significant disparity in size between them, defendant's nearly constant physical contact with the victim directing her where to go, his position of authority over her, the victim's fear of defendant and her belief that she would get in trouble if she didn't comply with his directives, defendant's verbal refusal to let her leave the tree area, and his questions to the victim indicating she should be quiet during the incident and that she shouldn't tell anyone what happened. Based on this evidence, the jury could reasonably conclude that defendant impliedly threatened hardship if the victim did not comply with his directives or acquiesce to his touching.

Defendant contends that the evidence of duress is insufficient based on this court's opinion in *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*). We find *Espinoza* distinguishable. In that case, the defendant "did not grab, restrain or corner" the victim. (*Id.* at p. 1320.) The victim also "made no oral or physical response to his acts." (*Ibid.*) In contrast, in this case, there was evidence that defendant held onto the victim when walking, pulled her to the tree area, and refused her oral request to go back to the classroom.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Chow
H045576